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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1979

NO. 79-999

FLORIDA EAST COAST RAILWAY, PETITIONER

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

RESPONDENT,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether a taxpayer has been denied equal protection of the laws where it is assessed a deficiency in a self-assessing excise tax, where it is the only taxpayer assessed for the audit period at issue, but where it fails to show that other similarly situated taxpayers have not voluntarily remitted the tax in question, and where it does not invoke available remedies to assure that all other similarly situated taxpayers

are paying the same tax.

STATEMENT OF THE CASE

This case arises from review of an administrative order of the Department of Revenue of the State of Florida (the "Department") assessing a sales and use tax deficiency against the Petitioner, Florida East Coast Railway Company ("FEC"). "FEC" instituted a proceeding under §120.57, Fla. Stat., requesting review of a proposed tax deficiency covering the audit period November 1, 1971 - October 31, 1974. The original notice was dated June 18, 1975, and was revised on December 14, 1977. The ultimate amount of tax placed in dispute was $201,635.58, exclusive of interest. This amount eventually was paid prior to the administrative hearing, transforming the proceeding from one to contest an unpaid deficiency assessment to one for a tax refund.

On the merits, the Department took

the position that the payments FEC made to Fruit Growers Express Company, Inc., and Trailer Train Company, Inc., for the rental within the State of Florida of refrigerator cars and flatcars, respectively, were subject to a 4% excise tax imposed by §212.05(4),Fla. Stat. Although FEC originally contested this contention, it no longer does so.

FEC also took the position that it had been denied equal protection of the laws, because, according to it, no other entity with similar transactions had been similarly assessed. Although the Petitioner contends that this is an "undisputed fact," the Department has never concurred in this proposition. Although an employee of the Department testified that, to his knowledge, no other company had been assessed deficiencies on similar transactions during the time in question, he also pointed out that without conducting an audit of all other

railroad companies in the State of Florida, it could not be determined whether those other railroads were actually paying a similar tax to that assessed against FEC since the assessment and collection of Florida sales and use taxes is based on voluntary compliance by the taxpayer.

The case was heard administratively before a Hearing Officer of the Division of Administrative Hearings of the State of Florida. In due course, he submitted a recommended order, recommending that the transactions were taxable, but holding that there was no administrative jurisdiction to rule on the "equal protection" argument of Petitioner. Thereafter, the head of the Department of Revenue accepted this recommendation as its final order.

Thereafter, the FEC appealed this final administrative order to Florida's District Court of Appeal, First District of Florida,

under Section 120.68, Fla. Stat. The Court affirmed, without elaboration, finding the order to be free of error.

FEC then appealed the decision of the District Court of Appeal, First District, to the Florida Supreme Court. The Department of Revenue moved to dismiss this appeal citing to the limited jurisdiction of the Florida Supreme Court under Art. V, Sec. 3(b)(1), Constitution of Florida, and urging specifically that the decision of the District Court of Appeal had not construed a controlling provision of either the Florida or Federal Constitution. The Florida Supreme Court received briefs on the merits, but thereafter entered its order granting the motion to dismiss.

ARGUMENT

FEC's arguments in its brief are wholly invalid for they spring from first, an invalid theoretical premise and second,

are grounded upon a factual situation which clearly has not and could not have been proven in the proceeding below.

The Petitioner's arguments are based on the contention that a tax has been assessed solely against one member of a class and that such tax assessment has never been made against other members of the same class all of which members incurred identical tax liability. The theoretical premise upon which such contention is based is improper for the tax in the instant matter is assessed by statute, §212.05(4), Fla. Stat., and is clearly assessed against all similarly situated parties in this state. Unlike the ad valorem real property and tangible personal property taxes in Florida and other states in which the taxing officials actually determine the amount of tax and send an assessment notice to the individual taxpayer, the Florida sales tax is a

self-assessing tax in which the duty is upon the taxpayer to notify the taxing officials of the amount of tax due and owing the state. In §212.11(1),Fla. Stat. it is clearly provided:

> . . . for the purpose of ascertaining the amount of tax payable under this chapter,it shall be the duty of all dealers to make a return, on or before the 20th day of the month,to the department, upon forms prepared and furnished by it, showing the rentals, admissions, gross sales or purchases as the case may be, arising from all leases, rentals, admissions, sales or purchases taxable under this chapter during the preceeding calendar month.

The Department's function regarding the sales tax is not to initially assess it but rather to insure through the use of the Department's audit powers that the sales tax is properly being self-assessed. See §§212.12-212.14,Fla. Stat.

In the instant matter the Florida Legislature through the enactment of

§212.05(4), supra, has clearly imposed the tax upon the privilege of leasing or renting tangible personal property in this state. Although FEC contested substantive tax liability below, it has not raised this issue before this Court. Consequently, the tax in question has been imposed by the Florida Legislature against any taxpayer whose factual situation is the same or similar to the Petitioner, FEC. Whether there are in fact any similarly situated taxpayers in Florida and whether such similarly situated taxpayers are in fact properly paying this tax can only be determined by an audit of such taxpayers. See §212.07(9), Fla. Stat.

The constitutional law applicable to asserted denials of equal protection in the enforcement of an otherwise proper tax by the administrative agency charged with such enforcement is entirely different than that

cited by the Petitioner in its brief. The general rule of law concerning unlawful discrimination in the administration of a tax is that in order for discriminatory enforcement by tax officials to constitute a denial of constitutional equal protection entitling the taxpayer to relief, there must be some affirmative showing of intentional discrimination adopted as a practice, and not merely a showing of mistake or lack of diligence in seeking out those who are subject to the tax. Sunday Lake Iron Co. v. Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 (1918). In the present case, the record created by the Petitioner at the administrative level shows, at most, a lack of diligence in seeking out other similarly situated taxpayers.

Perhaps the leading case on the subject of unconstitutional discrimination in the administration of a tax is that of Lewis

K. Liggett Company v. Lee, 288 U.S. 517, 53 S.Ct. 481, 77 L.Ed. 929, 939, 940 (1933), a case arising out of Florida, wherein this Court held:

> The bill avers that the [Florida] state officials charged with the administration of the act have failed to demand the tax and do not intend to collect it from the owners of stores in certain lines of business, such as furniture dealers. This alleged official dereliction is claimed to be unconstitutional discrimination in the enforcement of the act. For this proposition Appellants rely upon a decision such as Cumberland Coal Company v. Board of Revision, 284 U.S. 23, 76 L.Ed. 146, 52 S.Ct. 48, and Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239, 76 L.Ed. 275, 52 S.Ct. 133, holding a failure to assess all property taxes ad valorem at the same proportion of its value to be a denial of equal protection. The principle upon which those cases rest is that where a statute lays a tax upon property ad valorem at an even and equal rate, discrimination may result from the fact that the assessing officials systematically and intentionally value some property subject to the tax at a proportionate of its true value

> different from that fixed with respect to other like property. They do not support the Appellants' contention that where the taxing officials fail and neglect to exact the tax from some persons alleged to owe it, all others who are subject to the levy are in virtue of such ommission exempt. . . .
>
> Under the law of Florida every unit of the tax paying public has an interest in having all property subject to taxation legally assessed, and may in behalf of himself and others in like situations require that all property subject to taxation be placed on the tax books and bear its proportionate part of the expense of government. The Appellants, if they deem the tax illegally omitted in certain cases, may apply for a writ of mandamus to compel the taxing officials to do their duty. State ex rel. Dofnos Corporation v. Lehman, 100 Fla. 1401, 131 So. 333. Failure to collect the tax from some whose occupations fall within the provisions of the act, cannot excuse the Appellants from paying what they owe. And certainly the remedy afforded by state law assures them equal treatment along with all others similarly situated.

The Petitioner seeks to avoid the impact

Liggett by pointing out that Florida has a three year statute of limitations on assessing tax deficiencies, with the result that the Department could not now voluntarily, or in response to a mandamus action, assess other similar businesses for any deficiencies which might be found to exist for the audit period involved in this case. However, Petitioner offers no explanation why it could not have instituted such an action on June 18, 1975, when it was served with the first notice of assessment, which included these transactions, or at such earlier time as it may have become aware that the audit included the transactions involved herein. To now grant Petitioner a tax refund would be, in effect, to reward it for its own lack of diligence.

In the instant matter the FEC has not come forward with any evidence whatsoever nor has it even alleged that the Department

has in any manner pursued a course of intentional, systematic and deliberate discrimination in the enforcement of the sales tax in question. In summary, the FEC argues that a denial of equal protection in the enforcement of a tax will occur unless every taxpayer under Ch. 212, Fla. Stat. in this state is audited at exactly the same time by the Department of Revenue. This, besides being a physical impossibility, is clearly not the rule of law applicable to such situations. Consequently, even if Petitioner's conclusion that there are other railroads operating in this state which "are equally liable," a fact upon which there is absolutely no evidence in the record, its contentions still must fail for it has wholly failed to either allege or in fact prove that the Department was in any manner guilty of intentional discrimination adopted as a practice in its

enforcement via the audit function of the tax in question.

CONCLUSION

Neither of the two Florida appellate courts below considered the records presented to them to properly raise the constitutional issue involved herein, as evidenced by the fact that the intermediate appellate court did not specifically address this issue, and the Florida Supreme Court dismissed for lack of jurisdiction even though its jurisdiction does include those decisions of lower courts which construe controlling provisions of the Federal Constitution. The Florida Courts were eminently correct in their handling and disposition of this case, since Petitioner established, at most, that other taxpayers had not been assessed deficiencies on similar transactions during the audit period, without showing whether they

voluntarily remitted the proper tax. Moreover, Petitioner has not offered a reasonable explanation as to why a mandamus action to secure the taxation of similar taxpayers would not protect its interests while preserving the integrity of the state revenues. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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